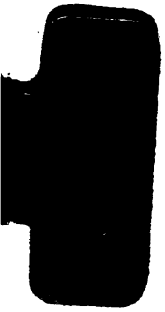
HARCOURT

Additional letters

1863



ADDITIONAL LETTERS

BY HISTORICUS.

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ON SOME QUESTIONS

OF

INTERNATIONAL LAW.

London and Cambridge.
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PREFACE.

IN putting forth these further letters on some topics of public interest, I have to acknowledge with gratitude the unmerited indulgence which has been extended on both sides of the Atlantic to my former attempts to elucidate some of the difficult questions as between neutrals and belligerents to which the unhappy war in America has given rise. The doctrines I have ventured to lay down have been naturally subjected to a searching criticism by each party in turn, to whose interests they appeared alternately adverse. After a careful consideration of that which has been alleged on either side, I do not find much reason materially to modify the views I have expressed in my former letters.

The doctrine I have maintained on the subject of 'Recognition' seems to have met with general acceptance. It has been confirmed by the high authority of the Earl of Derby and of Earl Russell. The remarks of Lord Derby on this topic will be found at p. 36 of my former publication. The speech of Lord Russell in reply to Lord Stratheden's motion in favour of a Recognition of the South contains the following observations from the mouth of certainly one of our greatest masters of political history:—

> We come, then, to the course proposed by my noble friend, namely, that of recognition. My noble friend alluded to several cases—not very happy illustrations of his argument, I think—in which the United States of America have recognised insurgent countries which

they believed likely to be able to maintain their independence. One was the revolted state of Hungary, whose independence had sunk like the island in the Mediterranean. It had disappeared before the despatch reached Vienna by which the United States recognised it. Another instance referred to by my noble friend scarcely comes within the category, though it has been quoted by a gentleman who has written some very able letters under the title of 'Historicus'—I mean the recognition of the United States themselves by France two years after the war with this country had begun. If anyone will examine that precedent, and the important documents which have lately come to light, he will see that the French monarchy of the day had, most unfortunately for itself, been exciting democratic passions in America, and had been endeavouring to raise opposition there to the Government of Great Britain. It had prepared means of concert with those States; and even in the letter, so courteous in appearance, but so exceedingly hostile and bitter in its spirit, written by the French ambassador, it was stated that the French Government had not only made a treaty of commerce with the United States, but further, that they had a right to carry that treaty into effect, if necessary, even by force. This was a threat to take part in the war between Great Britain and her revolted colonies. But we know that besides this open threat there was a secret treaty signed, by which France lent her support to the revolted provinces, and the opposition of this country, which was then as decided as ever any opposition was, agreed that the threat was one of war, and that by war only could it be met. This was not a case of recognition, but a case of interference. It was, I think, a most unjustifiable interference, an interference for the purpose of spreading those democratic principles which afterwards reacted on France, and produced so many excesses and crimes during the revolution. Well, then, with regard to the other cases to which my noble friend has alluded, those of Portugal and Holland, were cases of forcible intervention. There is hardly more than one case in which the question was limited to simple recognition—that was the war carried on between Spain and her revolted colonies, which went on from 1808 to 1822 or 1823 without any proposal for a recognition. This case is one worthy of the attention of your lordships, because it was illustrated by the mild wisdom of Lord Lansdowne, by the profound research of Sir James Mackintosh, and by the dazzling genius of Canning. We have, therefore, upon this question of recognition as much light as can possibly be thrown upon any subject. Now I beg to refer your lordships to the words of Lord Lansdowne. He was zealous for the recognition of the South American provinces, he thought it would

be a great advantage to this country to recognise them, and he was entirely free from any trammels of office, or any obligation to consult the interests of the minister of the day. But with that wisdom and forbearance which characterised every act of his public life, he stated that the first thing to be considered was the right, and he went on thus :—'It will be my duty this night to point out to your lordships the great advantages which may result from the establishment of South American independence. I hope I shall never stand up in this House to recommend your lordships to adopt any course of policy inconsistent with those principles of right which are paramount to all expediency, and which compose that great law of nations, any departure from which, to answer a selfish and ambitious policy, never fails to recoil upon its authors.' These are words upon which this House may well reflect, and we may well consider upon what grounds Lord Lansdowne founded the views which I have just brought under the notice of your lordships. In the first place, he stated it was necessary that a country which required to be recognised should have established its independence. In the next place, that it should be able to maintain that independence for the future ; and, lastly, that it should be able to carry on with all foreign nations those relations of peace and amity which form the general international law of the world. Now, examine the state of the revolted provinces of Spain at that time, as Sir James Mackintosh and as Mr. Canning did. We find that the greater part of South America had been some twelve or fourteen years entirely free from the presence of Spanish armies. We find that with regard to those provinces in which that was not absolutely the case—namely, Mexico, where Vera Cruz alone was occupied by a Spanish garrison, and Peru, where there were 4,000 or 5,000 Spanish troops—although the cause of Spain seemed hopeless, it was agreed that their recognition should be deferred, and that only in the case of Buenos Ayres and those parts of South America which had clearly, and for a number of years, established their independence, would it be right for Great Britain to proceed to the step of recognition. Besides this, Mr. Canning took care to inform the Spanish minister that such recognition would not be very long delayed, that if the Spanish Government wished to recognise them they ought to take that step, and that Great Britain was willing to give time before proceeding to recognise them herself. Well, here is a great precedent for our consideration—here is a step taken by the Government of the day after considerable care and examination ; here is a course recommended by the Opposition of the day, not in any harsh spirit, but notwithstanding the conviction which this country generally entertained

that the cause of Spain was hopeless and that the independence of those provinces was firmly established. Well, now, if we look to the present position of North America, and compare it with that of the states of which Lord Lansdowne spoke, we find that the war in North America is still carried on with the utmost vigour—I had almost said with the utmost fury. We find some of those provinces which were the first to proclaim their independence—a great part of Louisiana, New Orleans, and the banks of the Mississippi—occupied by the Federal armies. There are very considerable Federal armies menacing cities of the Confederation, such as Charlestown and Savannah. So that no man can say it is a case of hopeless war. For my own part, and speaking according to my limited vision, I do not believe those efforts of the Federals will be successful. But no man can say that the war is finally over, or that the independence of the Southern States is established. Well, then, what is the present state of the case? Although great efforts have been made in vain, the great Federal Republic seems unwilling to accept the decision of events. So far from it, we find the last acts of the Congress which has just expired are to place, by conscription, every man fit to carry arms at the disposal of the President of the United States, and to vote sums of money amounting to no less than 180,000,000*l.* sterling for the purpose of carrying on the war. Well, then, in this state of affairs I should say that, looking to the question of right, it would not be a friendly act towards the United States, it would not be to fulfil our obligations to a country with which we have long maintained relations of peace and amity—a great country which says it can still carry on the war—it would, I say, be a failure of friendship on our part if at this moment we were to interpose and recognise the Southern States.

It will be observed that in this speech, whilst confirming the general conclusion to which my former letters pointed as to the doctrine of recognition, Lord Russell takes exception to the particular view which I have expressed as to the precedent of 1778. In this criticism the Foreign Secretary has been followed by the high authority of the Chancellor of the Exchequer. It would seem almost presumptuous to argue against the conclusions of such distinguished critics. What I have to say on this point has been already said in my former publication in answer to a similar objection taken by the 'Edinburgh Review.' The reviewer contended on

similar grounds that the treaty of commerce communicated by the Marquis de Noailles was not the alleged cause of the English declaration of war. I confess that, with the most unfeigned deference for such eminent authorities, I have been unable on the most careful consideration of the diplomatic documents to arrive at that conclusion.

The whole discussion is perhaps rather one of words than of substance. But in point of form upon the pleadings (as the lawyers would say), it still seems to me that the issue of war was joined on the commercial treaty which constituted the act of recognition. I have no difficulty in admitting that there was much else in the conduct of the French Government which afforded great and just cause of resentment to that of Great Britain. I fully agree that the French Government contemplated much more than mere recognition, and had actively prepared for the intervention on which they were determined. Knowing or suspecting all this, it would unquestionably have been open to the King in his message to Parliament to have rested his quarrel with France upon these other and more serious grounds. But the important point to observe is that in fact he did not do so. It is said (and truly) that in the despatch of the Marquis de Noailles allusion is made to 'eventual* measures,' which are rightly interpreted to refer to the treaty of alliance between France and the United States. But if the English Government meant to rely principally on this point, why did not they put it prominently forward in the king's message? Instead of doing so, they place the treaty of commerce in the van of their battle. The preamble of the message runs thus: 'His Majesty having been informed, by order of the French

* The word 'eventual' in my former publication was misprinted 'effectual,' an error which has been perpetuated by other critics of this passage.

king, that a *treaty of amity and commerce* has been signed between the court of France and certain persons employed by His Majesty's revolted subjects in North America,' &c. This I cannot but think is what is subsequently referred to in the same document as the 'offensive' part of the 'communication on the part of the court of France,' nor indeed is there anything else spoken of in the message but this which could properly be designated as an 'unprovoked and an unjust aggression on the honour of the Crown and the essential interests of the kingdom, contrary to the most solemn assurances, subversive of the law of nations and injurious to the rights of every foreign power.' It is said that the tone of the French despatch was insulting; no doubt its perfidy and irony may have been in a high degree provoking. But even in 1778 nations did not go to war for a simple impertinence in the form of a communication. Still less could such an impertinence have been styled 'an aggression subversive of the law of nations and injurious to the rights of every foreign power in Europe.' What the British Government thus designated—and in my humble judgment justly designated — was the entering upon diplomatic relations by the negotiation of a treaty of commerce with revolted subjects of the English Crown, whilst the contest for sovereignty was still undecided.

Which is the right view of this particular transaction is not very material to the argument, for in fact the Chancellor of the Exchequer conceded the conclusion at which I had arrived, when he admitted that in every case where recognition had taken place during the pendency of the struggle, war had ensued. Now, as the doctrines of international law rest mainly on practice, this universal concurrence of precedent goes far to establish the rule. If war has always ensued from a particular

course of conduct, it would not be wrong to infer that such a course of conduct has been generally accepted by nations as being a justifiable ground of war. If so it may be taken as an established international rule. And with this remark I may properly take leave of this *vexata quæstio*, hoping that I may not seem to have been unreasonably pertinacious in adhering to the views I have expressed.

On the subject of intervention I here quote with pleasure the remarks of Lord Russell, from the same speech which I have already cited:—

Now, I wish to say only a few words upon that which we have done in former days by way of intervention. We, too, like other states, have at times taken upon us to intervene. We interfered in the case of Holland to save her from the religious tyranny and political despotism of Philip II. That contest was hallowed by the blood of Sir Philip Sidney, and by the part we took we contributed to her independence. In another case—the case of Portugal—we interfered. Charles I., Cromwell, Charles II., all agreed in that interference. We declared ourselves ready to send 10,000 men to the aid of the New Government of Portugal, and we helped the Portuguese to relieve themselves from the Spanish tyranny under which they groaned, and to establish the independence of their state. In more recent times, when Greece endeavoured to establish her independence, we aided her in her contest with Turkey; we rescued her from the destruction which threatened her, and helped her to found a free and independent monarchy. Take the case of Belgium again. When the Belgians declared that they were unable to remain under the Government of Holland, in accordance with the Treaty of Vienna, we interfered by force, in conjunction with France, and the wise and happy arrangement was made by which the freedom of Belgium was secured. Now, my lords, in all these instances, whether the intervention was carried on by our ancestors or in our own times, there is nothing of which an Englishman need be ashamed. *If we have taken part in interventions, it has been in behalf of the independence, freedom, and welfare of a great portion of mankind. I should be sorry, indeed, if there should be any intervention on the part of this country which could bear another character.* I trust that this will not be the case, and that no interests, deeply as they may affect us—interests which imply the well-being of a great

portion of our people, but interests which may affect also the freedom and happiness of other parts of the globe—will induce us to set an example different from that of our ancestors, but that when we are bound to interfere, it will be an interference in the cause of liberty and to promote the freedom of mankind, as we have hitherto done in such cases. It is with this conviction that I have addressed these few remarks as to what has been done by this country in former days, and I trust that with regard to this civil war in America we may be able to continue our impartial and neutral course. Depend upon it, my lords, that if that war is to cease, it is far better it should cease by a conviction, both on the part of the North and the South, that they can never live again happily as one community and one republic, and that the termination of hostilities can never be brought about by the advice, the mediation, or the interference of any European Power.

These sentiments are in all respects worthy of the time-honoured champion of liberty. They confirm by the highest authority the remark I have already ventured to make. 'To my mind, in the one word "slavery" is comprehended a perpetual bar to the notion of English mediation as between the North and the South; a bar to amicable mediation because it would be futile; to forcible intervention because it would be immoral.'

On the subject of the letters on 'Trade in Contraband of War,' and the 'Law and Practice of Blockade,' I need offer no further remarks, as I am not aware that their doctrine has been questioned.

The positions for which I have contended in the letters on 'Belligerent Violations of Neutral Rights,' and the 'Foreign Enlistment Act,' have been substantially sustained by the high authority of the Solicitor-General in his speech in the House of Commons on the case of the 'Alabama,' and by the summing up of the Chief Baron in the trial of the 'Alexandra.' As the latter important case is still *sub judice*, it would not be proper to offer any further criticisms upon questions which are about to receive the highest judicial exposition.

I may remark, however, that whether the summing up of the Chief Baron is or is not maintainable to its full extent, the two main propositions for which I have contended in my former letters seem now to be pretty well established; viz. first, that the Foreign Enlistment Act is purely a municipal statute, and not an Act in furtherance of any absolute international obligation; and, secondly, that that statute was not intended to prohibit the mere commercial sale of a vessel of war.

It must be admitted, I think, that the Foreign Enlistment Act is very unskilfully framed, and exhibits a certain confusion of ideas in the minds of its authors. The primary object of the enactment is (as its name denotes) the prohibition of the enlistment of the Queen's subjects in a foreign war. The brute material of ships comes in as an accident incidental to the intent of warlike operations. But, as I have asked before, why are ships to be prohibited rather than cannon or rifles or the gunpowder with which the illegal recruit is equally to be armed? Such a distinction is obviously illogical and unsustainable, unless it be on the ground jocosely suggested by a legal friend of mine, that ships are '*men* of war.' It cannot be denied that the present state of the Foreign Enlistment Act is unsatisfactory. The statute goes either too far or not far enough. It goes too far if it was intended to leave commerce in the apparatus of war unfettered; it does not go far enough if it was intended to prohibit and restrain such a commerce. At the same time, whilst I think there can be very little doubt as to the true view of the existing law, I am bound to say that I think there is great force in the argument which has been ably stated by Mr. Cobden in favour of a revisal of the present statute. An uncontrolled license of shipbuilding for war purposes by neutrals is a practice which

must necessarily work most injuriously to the belligerent Power, which enjoys the advantage of a superior navy. It is clearly, therefore, for our interest, as a matter of international policy apart from the question of international law, both by example and by legislation, to encourage the strictest view of this question; and to restrict rather than to enlarge by precedent the liberty of neutrals, to supply the deficiencies of inferior meantime belligerents. We shall probably never require that neutrals should build ships of war for our service, but it is not at all impossible that our enemies may need such an assistance. In such an event, the doctrine of the case of the 'Alexandra' will, I imagine, not be quite so popular in this country as it is at the present moment. It is not a little amusing to see how the sympathies enlisted on the rival sides in the American struggle, have changed in opposite directions the tendencies of English political sections on this class of questions. Thus, we find the 'Manchester School' advocating the restrictions of neutral trade, whilst the Tory journals have become the vehement partisans of unlimited commerce. As generally happens in cases where strong feelings are enlisted, both sides are a little in the right and a good deal in the wrong.

The letters in the present publication on the subject of the 'Doctrine of Continuous Voyages,' have not been previously printed, and the particular subject of which they treat is comparatively new. I offer them to public criticism with a full sense of the difficulty of the subject with which they are conversant, and the incompleteness of the manner in which they are here dealt with. There are too many persons interested in disproving them, not to secure for them an ample refutation if their doctrine is unsound. I desire no better than that their errors (if they be erroneous) should be demon-

strated. The discussion which they challenge will in any event be interesting, and the conclusions to which it may lead will be useful. On this and all other topics of this nature I can only say—

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum.

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BELLIGERENT RIGHTS OF MARITIME CAPTURE.

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BELLIGERENT RIGHTS OF MARITIME CAPTURE.

In some of my former letters I ventured to protest against the unreasonable irritation existing on the other side of the Atlantic, which seemed to arise out of an entire misconception of the relative rights and duties of neutral and belligerent States. I regret to perceive that there is growing up in this country a spirit of exasperation, provoked, as it seems to me, by an ignorance of the legal rights of the respective parties, not less extensive and equally to be regretted. The Government of Great Britain is loudly called upon to avenge insults which are supposed to have been offered, and to assert rights which are assumed to have been invaded. There are few spectacles less dignified than that of a nation in a passion, especially if it should be so unfortunate as to have at hand spokesmen to interpret its wrath who have as little regard for decency, moderation, and justice as has been exhibited by some recent orators in the House of Commons. I shall ask your leave to examine the question in a somewhat different spirit.

The immediate cause of dissatisfaction seems to have arisen from the seizure by Federal cruisers of such vessels as the 'Peterhoff,' the 'Adela,' and others. It is alleged that neutral vessels with innocent cargoes, and bound to neutral ports, have been unjustly captured. Now, if the Federal Government had asserted or did assert any right to capture vessels of such a character, it is quite plain that the Government of this country would be called upon instantly to repudiate such a pretension. But the fact is that the American Government, on the contrary, have distinctly disclaimed any such right. The instructions issued by Mr. Seward to the Federal navy are strictly in accordance with the law of nations, as understood and practised by Great Britain. We are bound, therefore,

by all the principles of justice which govern the relations of friendly States, to assume either that these orders have been observed, or that, if they have been violated by the misconduct of individual officers, that they will be disavowed by the American Government, and that reparation will be made.

But, further, let us inquire what reason there is in fact for concluding with certainty that anything unlawful has been done. The 'Peterhoff,' it is true, has been seized. It is asserted, indeed, that she was engaged in an innocent voyage and was freighted with an innocent cargo. It may be so; but also, it must be admitted, it may *not* be so. The important question is, how and by whom the character of that vessel is to be determined. The innocence of the 'Peterhoff,' indeed, is vouched by Mr. Crawford—a most highly respectable authority, it is true—nevertheless, I must be permitted to observe that it is not to this or any other private tribunal that the law of nations has referred the decision of this question. I have no hesitation in laying it down as an unquestionable proposition of international law, that as between the neutral and the belligerent Governments a capture by a belligerent cruiser is to be presumed lawful until the Prize Court has pronounced it illegitimate.

The principles applicable to this matter have been laid down by Lord Stowell in the great case of the 'Swedish Convoy' with a clearness and precision which leave no room for misunderstanding. In that case a fleet of neutral merchant vessels, under the convoy of a neutral man-of-war, some, if not all, of which were ostensibly destined for neutral ports, was seized by special order of the English Admiralty in the English Channel. In the elaborate judgment delivered by the Court, the rights of belligerents and the duties of neutrals are laid down with consummate accuracy. After establishing, *first*, the right of search, *secondly*, the right of detention of contraband with a hostile destination, Lord Stowell thus defines the *third* point, which is highly material to the present consideration:—

> Thirdly. Another right accrued—that of bringing in for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, *even those which professed to carry cargoes with a neutral destination.*

And then, referring to the threatened resistance by the convoy to such a capture, he adds:—

When the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done wantonly and without just cause, a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), 'I will submit to no such inquiry, but I will take the law into my own hands by force.' What is to be the issue if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed as often as there is anything like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? How far the peace of the world will be benefited by taking the matter from off its present footing and putting it upon this, is for the advocates of such a measure to explain. *I take the rule of law to be that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve by compensation inconveniences of this kind where they have happened through accident or error, and to redress by compensation and punishment injuries that have been committed by design.*

These, then, being the legal principles applicable to the case, let me ask how does it appear that they have been in any respect violated in the capture of the 'Peterhoff?' The American Prize Court is the only tribunal which has a right to pronounce on the legality of that capture. If the English Government should interfere before that adjudication, it would be guilty of a deliberate violation of the principles we have ourselves practised in our courts and maintained by our arms. In the case of the 'Trent,' the English Government rightly demanded direct and immediate redress because the American officer by his conduct had withdrawn the question from the possibility of the proper legal adjudication. But if we were now to interfere with that jurisdiction which has legitimate cognizance of the question, we should be guilty of an infraction of law not less serious than that committed by the captors of the 'Trent.'

But then it is said, 'Oh, it is quite certain that the "Peterhoff" was an innocent vessel.' Well, if it be quite certain, the captors will have to pay the penalty of their rashness, and if the Prize Court do its duty, they will not be in a hurry to repeat the error. If, indeed, there were any reason to suspect the American Prize Courts of injustice in their decisions or failure in their duty towards injured neutrals, it would be another matter. In such a case the neutral Government may

demand direct compensation from the belligerent for the miscarriage of justice. Such demands have been made upon, and conceded by, the English Government to neutrals who have had well-founded grounds of complaint, as, for instance, to Prussia in 1752, and to America in 1795. But I must say that I have not heard it asserted—still less have I seen it proved—that either in principle or in practice the American Prize Courts have departed from the rule of right. And if they have not demonstrably done so, the English Government can have no possible excuse for withdrawing from their jurisdiction the questions which the law of nations has expressly referred to them. Upon this subject, in his speech of May 18, in the House of Lords, Lord Russell rebuked the petulant intemperance of mischief-makers with dignity and moderation:—

I have been careful to refer every case of complaint that might come to us, whether through Lord Lyons or from the owners of vessels, to the law officers of the Crown, and they, after attentively watching all these decisions, say there has been no rational ground of complaint as to the judgments of the American Prize Courts. My noble friend, reviewing the proceedings connected with the trial in the case of the 'Peterhoff,' declares, on his own authority, that the decision pronouncing a certain person to be an alien enemy of the United States is a wrong decision, and he wishes the Government of this country to proceed upon his judicial determination that that decision of the United States court is erroneous. Well, it may have been erroneous, but I confess myself totally unable to judge whether it was right or wrong. But this I say, that a great country like the United States, having tribunals constituted under its own laws for the determination of these questions of prizes—those tribunals are not at once to be held to be of no value, and to have decided against the law of nations. On the contrary, our presumption must be, that as their knowledge of international law is very great, so their impartiality and their desire to do justice must be for the present unquestioned. We may be told, and it has been very often repeated, that a judge sitting in a national court, and bound to decide according to the law of nations, decides for all other nations interested in these questions of international law—that he does not decide solely for the benefit of England or of any one other country. Lord Stowell, in the great Swedish case, said: 'I am saying in a British court what I would have said if I had been a judge in a Swedish court, and have felt myself compelled to decide according to the law of nations, and the authority of great jurists and established precedents.' Are we to suppose that the judges of the United States courts, who are always quoted with respect, and often with admiration, by the great text writers on international law, whether in Europe or America—are we at once to conclude, because a navy captain has given a very faulty account of his captures, and because in one or two cases wrong has evidently been done, that the courts of the United States have sunk into such a state

of degradation that they will not do justice to the subjects of another country? My noble friend says that many of these vessels have been taken on very slight suspicion, and that this shows a foregone conclusion to interrupt British traders going to the colonies or to Matamoras on lawful voyages. With respect to that matter, I must ask this House to attend a little to circumstances which have evidently escaped my noble friend. Those circumstances are these: It has been a most profitable business to send swift vessels to break or run the blockade of the Southern ports, and carry their cargoes into those ports. There is no municipal law in this or any country to punish such an act as an offence. I understand that every cargo which runs the blockade and enters Charleston is worth a million dollars, and that the profit on these transactions is immense. It is well known that this trade has attracted a great deal of attention in this country from those who have a keen eye to such gains, and that vessels have been sent in the one case to Nassau, in order to break the blockade at Charleston, Wilmington, and other places, and carry contraband of war into some of the ports of the Southern States. Well, is it wonderful—is it a matter of which we can complain—that the cruisers of the United States look with suspicion upon vessels that are bound to Nassau, or are going from Nassau—that they very frequently stop them to ascertain from their papers whether they are not intending to break the blockade, or carry contraband of war to certain Southern ports? Well, there are two positions in which some of these vessels are placed. They are sent out with a view to an attempt to break the blockade, and directions are given among the ships' papers that they are to break it. That is one position, in which they very often make a most fortunate voyage and lucrative trade; and they exult exceedingly on the immense gains they make. But there is another position in which the owners of such a vessel sometimes find themselves—viz., that their vessel is captured, when the owner immediately comes to the Foreign-office with all the air of injured innocence, declares that nothing was farther from his thoughts than the breaking of the blockade, and asks that the strongest representations may be made to the American Government on his behalf. There are some instances in which I have no doubt the American cruisers have acted upon slight suspicion, and had no claim to seize the vessel, but that they should look with jealousy upon such cases as I have mentioned is by no means wonderful. We must be somewhat cautious in believing all the reports which are made to the Foreign-office by the owners of ships. Above all, I certainly am not prepared to declare, nor is there any ground for declaring, that the Courts of the United States do not faithfully administer the law, that they will not allow evidence making against the captors, or that they are likely to give decisions founded, not upon law, but upon their own passions and national partialities.

What may have been the real grounds of suspicion on which the 'Peterhoff' was seized cannot be known until the question is judicially investigated. Lord Stowell lays down expressly (*Rob. Rep.* iii., p. 153) 'that it is not necessary that the captor should have assigned any reason at the time of the capture; he

takes at his own peril, and on his own responsibility to answer in costs and damages for any wrongful exercise of the rights of capture.' It may well be that a vessel may be furnished with regular papers, and yet be bound to an unlawful destination. The captors may have reason to doubt whether her nominal cargo does not really cover unlawful goods, and whether her ostensible is in fact her true destination. Over and over again has the English Admiralty Court drawn from surrounding circumstances evidence of suspicion from which it has been justified in condemning vessels which might have appeared *primâ facie* innocent.* It cannot be said that the trade to Nassau and Matamoras is not surrounded with suspicion. How comes it that these small and insignificant ports, which two years ago were hardly known in Europe by name, are now as crowded with shipping as the Thames? Can we profess to be ignorant that the great majority of vessels bound to these ports are engaged in adventures which the American navy are entitled to prevent? Nassau, in fact, plays to America pretty much the same part as Embden—a name familiar to the students of Lord Stowell's decisions—did to Great Britain in the French war. In my former letters I have endeavoured to show, that it is no part of the duty of the English Government to protect the American Government from trade in contraband or breaches of blockade. That is a duty which the Federal navy must perform for itself. But we certainly are bound not to interfere with the means which the law of nations allows them for the purpose of themselves controlling such a traffic. Among the chief of these means is the right of search and the right of capture; and if the Federal cruisers submit the exercise of these rights to the revision and adjudication of the Prize Court, we can have no possible ground of complaint. It may be that sometimes an innocent vessel may suffer unmerited inconvenience far beyond the compensation which the Prize Court can award; but that is one of the evils of belligerent rights which we have too often inflicted to admit of our now refusing to endure.

A vessel with regular papers may be brought before a Prize

* To quote a single example—let the candid reader examine the principles on which Lord Stowell proceeded to condemnation in the case of the 'Magnus,' 1 *Rob. Rep.* p. 31.

Court. If it were not so, no prize would ever be made. More than half the neutral vessels condemned in our Courts in the French war were vessels with fabricated papers, made to evidence a false destination. English skippers have not been less ingenious in these respects than those of other nations, as may be seen in a note to M. Ortolan's chapter on the *droit de visite*, vol. ii. p. 207. No vessel purposing to run the blockade has its papers made out for the blockaded port. In the same way that a political conspirator always has his passport *en règle*, so the vessel on an unlawful voyage always takes care to have its documents in order. It is the business of the Prize Court to penetrate the disguise, and to expose the fraud. We have no right to expect that the belligerent Government should accept any other security for the *bona fides* of the destination and cargo than that which the law of nations has awarded to them through this judicial investigation. We ourselves distinctly refused to accept the guarantee of neutral Governments evidenced in the most solemn manner by the convoy of a ship of war. After this, can we expect that the American Government should rest satisfied with the assurance of the master of the 'Peterhoff,' or even with the guarantee of the member for the city of London?

I have seen a great deal of complaint of the 'spy system,' as it is called, which is supposed to be carried on in this country by the agents of the American Government. These complaints appear to me both childish and unjust. If, as must be admitted, the American Government are entitled to capture all vessels contemplating a breach of blockade, or freighted with contraband, they are clearly entitled to obtain such information as they can which may be useful to enable them to exercise their right. It is important for them to know which ship it is worth their while to watch and pursue, and which they may safely leave unmolested. Does anyone suppose that, if this country were at war, the English Government would not use every possible effort to obtain reliable information on such points? What is the object of diplomatic missions, except to obtain information (and that often secret information) on points material to the interests of their own Governments? Even in time of peace, every prudent Government takes pains

to make itself acquainted with what is going on in its neighbours' dockyards and arsenals. So far from such information being prejudicial to the innocent English shipper, it is exactly the reverse. If the American cruisers are well informed as to the real character of vessels, they will be less disposed to confound the innocent with the guilty, and they will be more likely to allow those who are not justly objects of suspicion to pass unmolested than if, in the absence of all information, they were compelled to suspect, and therefore to search and detain all alike.

A point has been raised in the recent discussions which is of great importance, viz. whether a neutral vessel, with an immediate neutral destination, can be condemned because either the ship or the cargo may have an ultimately hostile consignment? This is a question of very considerable difficulty and complexity. If the American captors choose to raise it at their own risk in a Prize Court, we are bound to await its adjudication.* It is impossible to conceive any question which more exclusively appertains to the domain of judicial decision.

With reference to the detention of the crews of certain prizes, the facts do not appear as yet to have been definitely ascertained. It is an equitable rule of the Prize Court that a ship can only be condemned in ordinary cases on the evidence of its own papers and its own crew, and for the purpose of obtaining their evidence they may sometimes be detained. Whether the American Government have exceeded their fair rights in this respect is a point not yet determined; but before we can make a quarrel of it we must see whether they will refuse reparation if injustice has been done. Looking, therefore, at the several grounds of complaint, I can find no just foundation for the extreme irritation to which they seem to have given birth. I must confess I see no distinct evidence that even the Federal cruisers have exceeded the ordinary exercise of belligerent rights; still less can I find any proof that, if any such excess has taken place by negligence or

* An attempt to examine the principles applicable to this interesting question will be found in two subsequent letters. The short allusion here made to this question, as it originally appeared in the *Times*, seems to have misled a writer in a recent number of the *Home and Foreign Review*, who has failed to appreciate the real conditions of the discussion.

design, the Government of America is prepared to justify or to maintain it, or that their Prize Courts are not disposed to do justice to the injured parties. This being the case, I confess it does seem to me that the language of certain members of the English House of Commons is such as is greatly to be condemned and deeply to be deplored. From these intemperate and unjust declaimers I turn with satisfaction to the calm, moderate, and dignified language of the person to whom the English people have confided the duty of speaking in their behalf to foreign nations. These are the words of Lord Russell, spoken in the House of Lords:–

> When we were belligerents, many cases involving belligerent and neutral rights were brought before a very eminent judge, whose decisions are generally and universally respected; and, though I believe he carried the principle favourable to captors to perhaps rather a severe length, beyond doubt they were in conformity with the law of nations. I allude to Lord Stowell. We were then belligerents; we are now neutrals. But I said I thought it would not become the character of this nation, because we had changed our position, to invoke another law and another measure; to declare that those decisions of Lord Stowell which were advantageous to us when we were belligerents should be thrown aside and rejected by us when we became neutrals. Accordingly, those persons who think that, whatever may be the destination of a ship, and whatever papers she may have on board showing that she is about to break the blockade, or to carry arms to some one of the Confederate States now in hostility with the United States, they are to be protected by the power of the British nation in contradiction to all our own decisions and in contradiction to the declared law of nations, will, I hope, know that the British Government never will place itself in that position. Let us look impartially at these cases which have occurred. It may be that we have suffered grievous wrong; it may be that we have a right to considerable reparation; but let the two Governments treat the cases fairly. We have on this side of the Atlantic the decisions of a great judge; in America, they have the views laid down by Judge Story and the writings of Mr. Wheaton. With these authorities to guide us, let us see who is in the right and who is in the wrong. But let us discuss the circumstances with a wish to do justice to each other. Don't let us be led by passion into anything which is not founded on justice, and which cannot afterwards be justified in the face of the world.

This is language which is worthy of an English statesman, and, I may add, worthy of an English gentleman; and I trust that it is by this standard alone that we shall be judged by the public opinion of Europe and by America. It is impossible to conceive anything more injurious to the character of this nation

than that it should be supposed that we unjustly refuse to abide as neutrals by the rules which, as belligerents, we have rigorously enforced. To act thus would be to give a damning verification to the offensive aspersions which have been cast upon our national fame by continental libellers. Let us rather rejoice to see the boasted champions of neutrality building up impregnable bulwarks and fortifying by modern examples those belligerent rights for which we so long contended against a world in arms. I have seen the Solicitor-General sneered at for want of 'gallantry.' I hope the day may be far distant when gallantry rather than law shall be looked to as the most essential qualification of the legal advisers of the Crown. I trust that when it is clearly ascertained that our rights have been invaded, this country will never want a Government which has the will and the power to maintain and redress them. But if the unspeakable disaster of war is destined to overtake us, I hope we shall never forfeit the right to the reflection that we have done nothing to provoke or to precipitate it. In a just cause, and with a safe conscience, England need never fear. But it is not in the language of braggart, and it may be uncalled-for, defiance, that so terrible an issue is to be approached. And of this I am sure, that it is not to those who bully the loudest that we shall look in the hour of difficulty and danger to maintain the dignity and the honour of a proud and generous people.

II.

BELLIGERENT RIGHTS OF MARITIME CAPTURE.

I HAVE not failed to observe that the last letter I had the honour to address to you has given rise to animadversion in various quarters. In the discussions to which you have indulgently afforded me a liberal space in your columns I have had, and have, but two objects in view—the first, to maintain what I believe to be the sound principles of public law; the second, to vindicate what I know to be essential alike to the character and the interests of the country to which it is my happiness to belong. Whether the arguments I address to your readers subserve the cause of the North or of the South, is to me profoundly immaterial. To the interests of the rival factions engaged in the internecine strife now unhappily waged among a kindred race, I am as much indifferent as it is possible to be without disregard to the ordinary sentiments of humanity. That I have not altogether failed in the impartiality I have desired to observe I may venture to believe from the dissatisfaction which my remarks have had the good fortune to elicit, in turn, from the partisans of the rival combatants. If the views I have taken the liberty to express on the subject of Recognition, Intervention, and Capture have been distasteful to gentlemen of 'Southern proclivities,' my remarks upon the topics of the Foreign Enlistment Act and Contraband Trade appear to have been equally obnoxious to Northern sympathizers. To have earned the consistent applause or condemnation of either would have satisfied me I must have been in error. I am abundantly content with their alternate disapproval and occasional assent.

I have seen it asked, with a degree of not unnatural impatience, whether the American Government is to be permitted to enjoy the advantage of two codes—whether, in fact, they are to have the benefit of a doctrine favourable to neutrals

when they are at peace, and to insist, when they are at war, on the extreme theory of belligerent right. If this supposition were well founded in fact, I could readily concede that the complaint would be entitled to much consideration. There are nations in Europe between whom and ourselves such a question might raise difficulties of no ordinary kind. There would arise a sort of cross estoppel between the parties, who might each allege against the other a former practice inconsistent with their present pretensions. To the members of the Armed Neutrality we might deny the exercise of the rights they had always repudiated, while they, on the other side, might insist on the doctrines which we had gone to war to maintain. But this game of 'cross questions and crooked answers' happily does not find any place in our relations with the American Government—at least, as represented in their judicial tribunals. Upon all the cardinal and leading questions of belligerent rights the American and English doctrine is and always has been in complete accord.* The question of the impressment of seamen was almost the only exception, and on that point I think we must now admit that the Americans were not in the wrong. Upon all the topics with which I have had occasion to deal, the writers and the courts of both countries are absolutely agreed. Wheaton, Story, and Kent are in complete accord with Sir W. Scott and Sir W. Grant. In support of this assertion I may cite the following striking testimony from a judgment pronounced by the English Privy Council in the course of the late war with Russia:—

> The law which we are to lay down cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the law of nations foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all her principles of prize law from the decisions of English courts. . . . Whatever is held in England

* There are few things more remarkable or more creditable than the manner in which the legal authorities in the United States, throughout the war with Great Britain, persisted, contrary to the interest, and perhaps the desire, of the American Government, in maintaining the established doctrines of belligerent rights.

to justify or excuse an officer of the British navy will be held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nation.—*The Ostsee*, 1855.

It will be seen, then, that in insisting on the strict doctrines of our belligerent code the American Government is not to be charged with departure from its own principles. We should therefore remember the equity of the maxim,

Cædimus, inque vicem præbemus crura sagittis.

To pass to another topic of complaint. It is alleged, with what foundation I know not, that French traders are more leniently treated by the American cruisers than vessels sailing under the English flag. If the circumstances were in all respects the same, it must be admitted that this would be conduct of an unfriendly character. But, at the same time, it must be also observed that, so long as the strict rule of right is not exceeded as regards ourselves, it hardly lies in our mouth to object that it is not rigorously enforced against others. If I have a right of action against two persons, I am not to lose my suit against one because, for any reason, I do not choose to proceed against the other. But, next, is it to be at once assumed that the circumstances are equal in the two cases? England, as we well know, has what the French term a *spécialité* for the manufacture of 'hardware.' And it is not wholly impossible that American cruisers may have discovered, by conjecture, information, or experience, that this is a species of cargo which they are more likely to discover in English than in French bottoms. And, further, the French war in Mexico, even with reference to such goods themselves, makes it less probable *primâ facie* that they are destined for Southern arsenals. It is not, therefore, if the fact be as alleged, quite out of the question that French traders run the gauntlet of the blockading squadrons more freely, not because they are better protected than our merchantmen by their own Government, but because they are less suspected by the belligerent navy.

Another complaint, which, if well founded, is a serious one, consists in the alleged delay of bringing prizes to adjudication. In this respect, however, the captured vessel has the remedy in its own hands. The captor can always be compelled to proceed by monition; and if there is any undue delay, damages

are always given to the injured party, by way of demurrage. At the same time, it must be remembered that in time of war Prize Courts are choked with business, and difficulties of investigation intervene which make delay sometimes not easy to be avoided. I have before me, as I write, the case of the 'Anna Catharina,' in our own Admiralty Court (*Rob. Rep.* vi. p. 11), where the ship was taken on August 7, 1798, the sentence of condemnation was not passed till December 1803, and proceedings in respect of costs were still pending in April 1805. This was, no doubt, an extreme case; but a delay of more than a year between the seizure and final adjudication was by no means uncommon. A very accurate and full account of the principles and practice of the Prize Courts, in dealing with questions of this description, will be found in Dr. Phillimore's useful compilation, vol. iii. part xi., to which I refer your mercantile readers for more detailed information on points with which it is of great consequence to them to be accurately instructed.

I now arrive at another matter, the importance of which it would be difficult to exaggerate. As long as the question of the mail-bags remained in a litigious, not to say bellicose position, I advisedly abstained from hazarding any remarks which might embarrass a discussion surrounded with difficulty and peril. The course adopted by Mr. Seward in this matter—which, in spite of the obloquy which is heaped in certain quarters on all who are disposed to treat with justice any acts of the Government of Washington, I will venture to characterise as a course at once liberal, conciliatory, and courageous—has absolved us, in the consideration of this question, from the reserve which it might otherwise have been proper to exercise. And I think, considering the manner in which this question has been dealt with by the Federal Cabinet, those orators who have presumed to impute to that Government a deliberate intention to provoke hostilities with Great Britain may take no small shame to themselves for their intemperate injustice.* As the topic has now happily

* This question has, I believe, been discussed between the Foreign Office and the very eminent lawyer, Mr. Evarts, who was despatched from Washington to arrange this matter. What conclusion has been arrived at on the subject has not yet transpired.

passed from the region of angry dispute into that of amicable discussion, it is permissible to debate the question in its purely legal aspect. I have observed with much surprise that in some quarters it has been taken for granted that the immunity of the neutral mail-bag on board a neutral merchant-vessel from belligerent search was an established and indisputable principle of international law. Where the authority for such a proposition is to be found, I confess I am wholly at a loss to discover. That such a doctrine has ever been laid down by writers of authority, or practised in the Courts of maritime jurisprudence, I think it would be difficult to prove. Indeed, any lawyer who looks at the language of Lord Stowell, in the case of the 'Lisette,' cited in the well-known case of the 'Atalanta' (*Rob. Rep.* vi. p. 457), would be led to the very opposite conclusion. I am not unaware that M. Hautefeuille and other writers of the anti-belligerent school have insisted on this pretension. But the very principles on which they found their argument show at once that the doctrine contended for is wholly inconsistent with the established code of international law. Indeed, M. Hautefeuille on this point, as on others, finds it necessary (vol. ii. p. 187) to start with the characteristic remark, 'L'avis de Sir W. Scott ne saurait avoir aucun poids à mes yeux.' I need hardly say that in this country we are not prepared to found our reasonings on such an axiom. The same writer equally disposes, though somewhat less cavalierly, of the opinions of Mr. Wheaton and M. Ortolan, which square just as little with his ideas. Let us examine for a moment the principle on which the assumed privilege of the neutral mail-bag is supposed to be based. It is said that the official seal is inviolable, because it guarantees the *bonâ-fide* destination of the vessel which conveys it, and consequently, the innocence of the contents of the mail-bags. But what, after all, is this, except to revive in a still more obnoxious form the claim by the neutral convoy to privilege from search and capture which we extinguished amid the ashes of Copenhagen? The neutral convoy, at least, was a living, sentient, rational assurance that the vessels under its protection carried no unlawful freight, and that they would pursue none but a legitimate voyage. In the case of the convoy the commander was, at least, supposed to have satisfied himself as to

the innocence of the cargo and to warrant the propriety of the destination of the vessels under his protection. Nevertheless we, as the champions of belligerent rights, refused to accept this guarantee as a substitute for the right of search and the investigation of our own prize tribunals. And yet it is to be said that the official seal of the Post-Office—which cannot, like the convoy, compel the vessel to adhere to the destination to which it is addressed, and which is, unlike the convoy, attached without any means of knowledge of the nature of the materials which it covers—is to afford complete satisfaction to the belligerent Power. To my mind, I confess it seems impossible to escape from the conclusion that the pretension to the immunity of the mail-bag is an *à fortiori* case, and implicitly involves the admission of the right of the neutral convoy to oust the belligerent search. The intimate connection between the immunity of the mail-bag and the question of convoy is sufficiently indicated by the language of Lord Stowell in the case of the 'Madison' (*Edwards's Adm. Rep.*, p. 226). In that case it was sought to condemn an American neutral vessel on the ground of its having taken on board despatches from the French Government to America. The vessel was ultimately acquitted for other reasons; but when it was alleged in justification that the papers in question had come on board under the protection of the American Ambassador, the Court instantly rejected such a defence. 'Certainly,' said Lord Stowell, 'if these papers are really of a hostile and illegal nature, it is not in the power of the American Ambassador to sanction them or protect the conveyance of them. This Court has held in cases of convoy, that even the interposition of the sovereign of a neutral country will not take off the criminality of an illegal act. Still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent whose rights it is his duty to respect.' Let us take care in this matter what we are about. This is not an isolated question. It touches the very roots of the doctrine of belligerent rights, and undermines to its foundations the fabric of maritime supremacy. It may, or it may not, be right to discard the system for which our ancestors have fought, and by which the empire we have inherited

was compacted. But if this is to be done, let it be done considerately, with a full knowledge of the principles which are involved, and the consequences which will certainly ensue. If the guarantee of the neutral mail-bag is to be admitted as of right to exclude the belligerent search, we may depend upon it concession cannot and will not stop there. If the principle is good for so much, it is good for a great deal more. It involves nothing less than the general substitution of the neutral guarantee for the belligerent capture. Under the pressure of such a leverage the whole system which Lord Stowell expounded, and which Lord Nelson enforced, will crumble into dust; and the doctrines of the 'Armed Neutrality' will be established in all their plenitude on the impregnable basis of an irresistible logic. There may be those who desire such a consummation, which would go far to render our marine an empty display, and our navy an idle expense. I confess I do not rank myself among their numbers. I should see with the deepest regret and the greatest alarm the inevitable destruction of that belligerent code which I believe to be a just and necessary implement of warfare, essential alike to the security and the greatness of a maritime State. I am one of those who think that in the Declaration of the Congress of Paris we have already conceded quite enough. But this perilous innovation is instinct with consequences far more extensive and infinitely more dangerous.

Let us consider for a moment how the theory would work. In the first place, every merchant vessel carrying a mail-bag would become at once a licensed vehicle of contraband despatches.* But this is a very small part of the question. In

* In a very able pamphlet, entitled, 'Notes on Some Questions suggested by the Case of the Trent' (Parker, Oxford), by Mr. Bernard (the Chichele Professor of International Law in the University of Oxford), it is satisfactorily demonstrated, that to carry despatches *for* the enemy, even though it be only to a neutral port, is unlawful. But how is the penalty to be enforced, or the practice prohibited, if the bag containing this most noxious kind of contraband is safe from search? The same pamphlet contains a very interesting discussion of the right of seizure of enemies' persons on board neutral vessels, quite apart from the question of contraband, on which Mr. Seward most unskilfully rested his defence in the case of the Trent. Whilst Mr. Bernard (I think satisfactorily) disproves the right of seizure in such a case, he shows, at all events, that if the American Secretary had understood his business he might have made a good deal better case for himself than he

the present system of law as understood and practised by belligerents, the captor has a right to examine and seize the ship's papers, which evidence the character of the cargo and the destination of the vessel. No nook or corner of the vessel, no neutral convoying man-of-war, no privilege or concealment of any kind is permitted to withhold from his search that evidence on which alone condemnation can be founded. The destruction or suppression of papers is invariably fatal to the ship. But if the doctrine of a privileged mail-bag is to be established, who does not see that the real documents of an unlawful adventure will always shelter themselves under this safe refuge, and that the belligerent captors will be baffled by fabricated papers, which the master will keep by him for the express purpose of deceiving the captors? The ship's papers and all the other documents on which a condemnation can be founded will be franked by the official seal, the neutral Government of course knowing nothing of the contents of its own mail-bags, and being *bonâ fide* ignorant of the deception; and thus the whole right of belligerent capture will be absolutely defeated.

I hope, Sir, that we, who have won for ourselves and may have again one day to maintain by arms, a maritime dominion, are not going to tumble blindfold into such a pitfall. Depend upon it, the eyes of jealous and not over-friendly nations are upon us in this matter. They will regard with an anxious and half-ironical curiosity the bearing of the great maritime belligerent in her first real apprenticeship of neutrality; they will chuckle with glee over her inconsistencies; they will register with carefulness her delinquencies; and, believe me, they will one day reap the advantage of her mistakes.

I trust Her Majesty's Government will approach the negotiations on this matter which are already announced with the most provident and suspicious caution. A special and exceptional immunity of this character may be safely conceded on the one hand and accepted on the other as a matter of particular convenience or partial compact, without breaking in on general principles, or importing a dangerous solecism into the

did in his notorious despatch. Possibly, however, Mr. Seward did not wish to make too good a case, lest he should have felt under some obligation to support it.

established system of maritime jurisprudence. Mr. Seward's original letter on this subject affords an excellent foundation for treating the matter from this point of view. But I cannot repeat with too much emphasis, that to accept the principles on which the absolute immunity of the mail-bags is rested as a general and universal doctrine of international law, would be fraught with consequences the most dangerous and disastrous to a system which it is, above all things, our interest to vindicate and uphold. Let us not, with a shortsighted and foolish impatience, by snatching at a present and temporary advantage, sacrifice the permanent enjoyment of rights which we know not how soon we may require to exercise. Let us rather assist the American Government in the task they have so well begun, of ratifying by solemn examples the code it is so greatly to our interest to maintain. Let us confirm afresh, in a manner which none can gainsay, by our patience in neutrality, the principles we have so often established by our supremacy in war. Let us earn, as prudent neutrals, the right to be potent belligerents. And then, when the hour of danger overtakes us, we shall find that we have not ruined in peace those mighty engines of defence which can alone avail us in war. Let us beware lest in this matter Mr. Secretary Seward should play the part of an American Sinon to an English Troy.

> 'Scandit fatalis machina muros, . . .
> Instamus tamen immemores, cæcique furore,
> Et monstrum infelix sacratâ sistimus arce.'

I confess that what I fear is, not that the American Government should offer too little, but lest we should accept too much.

THE DOCTRINE OF CONTINUOUS VOYAGES.

I.

THE DOCTRINE OF CONTINUOUS VOYAGES.

In a recent letter I alluded incidentally to the question of the *status* with regard to capture of vessels and cargoes which, though immediately bound to a neutral port, might have a further and ultimate destination to the belligerent. Other occupations did not allow of my then enlarging on this topic, but as it is a matter of present interest, the bearings of which seem to be but little understood even by those who assume to instruct the public on the subject, I shall ask your leave to return to the discussion at a length more proportionate to its importance. I have already said that the questions involved are of no small difficulty and nicety, and of that, at all events, before I have done, I think I shall satisfy your readers. Some persons seem to assume that they can solve one of the most complicated problems of international law by the bare assertion of the unquestionable and axiomatic proposition that a vessel or cargo bound from one neutral port to another cannot be properly captured or condemned, either on the ground of contraband trade or breach of blockade. Now, if the real transactions of life could fortunately be always precisely referred to such very simple rules, the science of the law of nations would be a very easy business. But, unhappily, as all lawyers know by experience, the actual incidents of human affairs are rarely obliging enough to range themselves within the four corners of some indisputable cut-and-dried principle. There always occur exceptional circumstances and distinguishing *differentia*, which require the exercise of a disciplined reason in order to classify their attributes and appreciate their weight. It is from its office in the discharge of these difficult and useful functions that those who have justly understood the dignity of the law have regarded it not as 'harsh and crabbed as dull fools

suppose,' but as a science which truly deserves the style of the 'perfection of human reason.'

If it were perfectly clear in each individual case whether the vessel or the cargo were bound to a neutral or a belligerent destination, the question would be a very simple one. Cargoes and vessels directly bound to a blockaded port are in all cases subject to capture and condemnation, and so are cargoes of the quality designated as contraband, if bound to a belligerent though not blockaded destination. Cargoes and vessels with a neutral destination, whatever may be their nature or their lading, cannot be lawfully captured or legitimately condemned. These are simple and indisputable propositions; but they are far from exhausting the subject. It is clear that cases will arise in which the difficulty will be to ascertain what is in reality the true destination of the cargo or the vessel. It may be partly neutral and partly belligerent—i. e. it may be a compound voyage partaking of both characters. Before, then, the fate of the cargo or the vessel can be decided, it will be necessary in such cases to determine which is the governing characteristic substantial destination, for it is by this that the sentence of the Prize Court will and ought to be guided. Supposing a person is going first to Peterborough and then to York, or going to York viâ Peterborough, what is his destination? Is it Peterborough or York? This is evidently a question depending on the particular circumstances of the case, and cannot be simply decided by looking at the traveller's ticket to see whether he is booked through, or whether he has taken his ticket only for a part of the voyage, with the intention of re-booking at the intermediate point. Or, suppose we read Nassau for Peterborough, and Charleston for York. It is obvious that we must solve this question before we can determine whether the destination is neutral or belligerent. I have seen it very positively asserted that in all cases the immediate destination alone can be regarded, and that the ultimate consignment is wholly immaterial. I think I shall be able to satisfy your readers that such a proposition is not sustainable. While, however, in this country this view of the matter has been broadly maintained, I remark that on the other side of the Atlantic the exact converse of this doctrine has been laid down with equal

positiveness by a writer unquestionably entitled to attention. I have recently had the advantage of perusing the new edition of *Wheaton's Elements of International Law*, which has just appeared under the editorship of Mr. William Beach Lawrence. I wish I were able to say that the augmentation in value of this excellent treatise was at all proportionate to its growth in bulk. I must confess, however, that, as far as I have been able to understand them, the annotations of Mr. Lawrence have only embarrassed and confused the text to which they are appended, and by their looseness and inaccuracy tend to mislead rather than to enlighten the students of *Wheaton*. The editor's elaborate but wholly unintelligible dissertation on the case of the 'Trent' certainly is not calculated to give the learned reader a high opinion either of his legal discrimination or judicial impartiality. In this annotation I find the following passage, bearing on the question I am proposing at present to discuss:—

> As to articles of contraband, the rule does not confine their destination exclusively to the enemy's port, but includes all cases where they are attempted to be conveyed indirectly for the enemy's use. That is the principle of the law of nations, which does not rest on technicalities. The case of the 'Commercen,' cited in Mr. Wheaton's text, is authority in point that, where the object was to aid the enemy in his military operations, 'the destination to a neutral port could not vary the application of the rule; it was only doing that indirectly which was directly prohibited.' And in a case, during the Mexican war, of illegal trade with the enemy, it was decided by the Supreme Court of the United States, on the authority of Sir W. Scott, in *Rob. Adm. Rep.*, vol. iv., p. 82, the 'Jonge Pieter,' that the interposition of a neutral port would not render the transaction legal.—*Howard's Reports*, vol. xviii., p. 114, 'Jackson *v.* Montgomery' (*Lawrence's Wheaton*, ed. 1863, p. 957).

Now, though this passage contains no precisely controvertible statement, and is certainly a good deal nearer the truth than the assertions which have been made that the ultimate destination is wholly immaterial, still there is a breadth and a looseness about it which is calculated to mislead, without further explanation and limitation. In the first place, of the two authorities on which Mr. Lawrence relies, one is wholly beside the point in support of which it is cited. The case of Jackson *v.* Montgomery was one of trade on the part of a subject of the belligerent captor with the enemy, which is necessarily and universally unlawful, in whatever manner it may be conducted—

a state of things which offers no analogy, and furnishes no precedent whatever for the questions which arise as between neutrals and belligerents. It is the more remarkable that Mr. Lawrence should have fallen into such an elementary error because this distinction is insisted upon at large in the case of the 'Jonge Pieter,' before Lord Stowell, upon the authority of which Jackson *v.* Montgomery was decided. The other case cited by Mr. Lawrence, viz. that of the 'Commercen' (1 *Wheaton's Reports*, p. 382), is a good deal more to the purpose. That was a case of great importance and authority, and well worthy of the attentive consideration of those who wish to comprehend the subject. The 'Commercen' was in all respects a remarkable decision; and, as there was a difference of opinion between Mr. Justice Story and the Chief-Justice Marshall—on a point, however, collateral to that we are now discussing—it was very carefully considered and reasoned out, and Chancellor Kent and subsequent writers have quoted the judgment of the majority of the Court with approval. (*Vide Wheaton's Elements*, ed. 1863, p. 810, and *Kent's Commentary*, vol. i., p. 140.) The facts of the case were these:—A Swedish neutral vessel was captured by an American cruiser, while conveying grain, the property of British belligerent subjects, to Bilboa, a neutral port, for the use of the British belligerent army. The discussion arose on the question of freight. The goods, being enemies' goods on board a neutral vessel, were clearly liable to capture by the old rule; but if the voyage had been otherwise lawful, freight, according to the usual practice, would have been payable upon the cargo to the shipowner. In order to deprive the shipowner of his freight, it was therefore necessary to determine that the goods were contraband, and the voyage unneutral and unlawful. And this is, in effect, what the Court did decide. A curious cross-question arose in the case, because the war in aid of which the provisions were carried—namely, the Peninsular War—was a war with which the American Government had nothing to do. Their hostilities with England were wholly distinct from the European war in which England was engaged; and I must say I think there is great force in the argument of Marshall, C. J., that to assist England in such a war was no breach of neutrality

by a Swedish merchant in regard of America. However that may be, on this, at least, there was no difference of opinion, that the transport by a neutral ship of grain to a neutral port, for the purpose of delivery to the belligerent there, was a contraband and unlawful trade, which subjected the cargo to capture by the other belligerent. This case establishes, it will be seen, first, that *munitions de bouche* may, under such circumstances, be contraband; and, secondly, that when the delivery is intended to be to the belligerent, the fact that it is to be made in a neutral port does not exempt the cargo from capture on its road thither. The following passages of the judgment are worthy of remark:—

> But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war and essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination, and the mere interposition of a neutral port would not protect them from forfeiture.

And, again:—

> *Nor do we perceive how the destination to a neutral port can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses.* Would it be contended that a neutral might lawfully transport provisions for the British fleet and army while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British fleet stationed on our coast? We presume that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material than might be supplied under cover of a neutral destination like the present.

It will be seen that this judgment, though it does not, perhaps, support the proposition of Mr. Lawrence's note in all its nakedness and breadth, at least establishes this — that, when the evidence is clear and decisive that the delivery is to be to

the enemy, the mere fact that the destination and the place of transfer is at a neutral port will not justify the transaction.

The case of the 'Trent' happened, fortunately, to be one of singular simplicity, complicated by no modifying circumstances. The destination of the vessel, cargo, and passengers was clearly neutral, without any allegation or suspicion of any other or different terminus or object of the voyage. The innocence of the voyage was, therefore, in that case, altogether unquestionable. Nevertheless, in laying down the law on this matter, the British Cabinet, in their despatch of January 23, 1862 (written, no doubt, under the advice of the law officers of the Crown), very wisely and cautiously guarded themselves on this point. Lord Russell writes:—

In connection with this part of the subject, it is necessary to notice a remarkable passage in Mr. Seward's note, in which he says, 'I assume in the present case what, as I read British authorities, is regarded by Great Britain herself as true maritime law, that the circumstance that the "Trent" was proceeding from a neutral port to another neutral port does not modify the right of belligerent capture.' *If, indeed, the immediate and ostensible voyage of the 'Trent' had been to a neutral port, but her ultimate and real destination to some port of the enemy, Her Majesty's Government might have been better able to understand the reference to British authorities contained in this passage. It is undoubtedly the law as laid down by British authorities, that if the real destination of the vessel be hostile (that is, to the enemy's country) it cannot be covered and rendered innocent by a fictitious destination to a neutral port.* But, if the real *terminus* of the voyage be *bonâ fide* in a neutral territory, no English, nor, indeed, as Her Majesty's Government believe, any American authority can be found which has ever given countenance to the doctrine that either men or despatches can be subject during search on board such a neutral vessel to belligerent capture as contraband of war.

It is impossible to lay down the true law on this subject more accurately or satisfactorily than is done in this passage. If, as in the case of the 'Trent,' the '*real terminus of the voyage be bonâ fide in a neutral territory*,' the voyage is innocent, there ought to be no capture, and there can be no condemnation; but if '*the ultimate and real destination*' be to the enemy, then such a voyage cannot be protected, even though the '*immediate and ostensible*' consignment be to a neutral port.

Still, there remains the important and difficult question, How are we to distinguish between the '*ultimate and real destination*' of the ship and cargo and 'its *immediate and ostensible*'

consignment? For upon this distinction will depend whether in a particular voyage they are or are not subject to condemnation. This is a matter at once of so much nicety and importance that I cannot attempt to explain it within the limits of this letter (already sufficiently long) with that fullness and accuracy which is indispensable to its proper comprehension. I shall, with your leave, return to its discussion on an early occasion. Before I conclude, however, I must be permitted to remark on the singular and perverse spirit in which these questions are habitually handled in certain quarters, and which has been recently justly rebuked by those best entitled to speak with authority on the subject.

There may be some persons who consider that the whole doctrine of maritime capture bears too hardly upon neutral trade. That may be a very good reason for altering by common consent the established rules of the law of nations. But of all methods of reforming the law the worst is that of setting up a system to evade it. Those persons who are really engaged in lawful adventures ought to have no difficulty in proving their innocence. But I cannot understand how, while the law remains as it is, it should be a just ground of complaint that the attempts to commit a fraud upon it sometimes fail of success. I give Mr. Cobden and the gentlemen who share his opinions full credit for the sincerity of their views on these matters, however little I am able to coincide in them; but what I cannot comprehend is, how the writers of a party which professes a direct antagonism on this subject to the doctrines of the Manchester school, should so sedulously occupy themselves in cutting down the doctrine of belligerent rights. The American war has dissipated many of the dreams of the school of which Messrs. Cobden and Bright are the most eminent teachers; but none, perhaps, has it more entirely and finally dispelled than the projects for the abrogation of the belligerent code of maritime capture. For my part, I think the policy of Great Britain is clearly to defend the established system. If we happen to suffer by it for the present, we may take to ourselves that consolation which Lord Stowell offered to neutrals when we were belligerents in former days:—

I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connexions it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals.—'The Immanuel,' 2 *Rob.* 198.

The true duty of neutrals is nowhere better defined than in Lord Howick's despatch to Mr. Rist in 1808. We should do well not to forget the lessons we inculcated on neutrals, when we were ourselves belligerents.

'Neutrality,' says Lord Howick, 'properly considered, does not consist in taking advantage of every situation between belligerent States by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party, but in observing a strict and honest impartiality, so as not to afford advantage in the war to either; and particularly in so far restraining its trade to the accustomed course which is held in time of peace, as not to render assistance to one belligerent in escaping the effects of the other's hostilities. The duty of a neutral is "non interponere se bello non hoste imminente hostem eripere."'—10 *Cobbett's Parl. Deb.* 406.

Let us remember this, and be sensible and provident and patient. In the modern exemption of enemies' goods from seizure on board neutral vessels, we already enjoy a greater freedom of trade than has ever been conceded by belligerents in former wars. Let us not be misled by the silly and querulous complaints of those who in their blind partisanship for a foreign quarrel, with which we have nothing to do, are ready, in order to gratify their present wishes, to work irremediable mischief to the future interests of their own country. There are some men so intent upon the success of the South that they are solicitous for nothing so much as to cut down the belligerent rights of the North, forgetting, as it should seem, that in destroying the natural advantages of another maritime superiority they are striking a deadly and irreparable blow at that which constitutes the security and greatness of England.

II.

THE DOCTRINE OF CONTINUOUS VOYAGES.

In my last letter I undertook to return to the interesting question of the principles on which the true destinations of vessels and cargoes are to be determined; and the considerations upon which the *real and ultimate terminus* of a voyage is to be distinguished from its *ostensible and immediate direction.* I offer the following observations on this important and complicated subject to the attention of your mercantile readers, with an entire sense of their incompleteness. I am perfectly aware how far they are from exhausting the innumerable ramifications of an extensive head of law. If I can only succeed in making clear the leading and guiding principles by which the multifarious aspects of the question are governed, my object will have been accomplished.

This matter is, however, fortunately one in which we have not to start afresh from first principles, or to grope in the dark; it is one on which the recorded decisions of our own Prize Courts throw abundant light. The question of the origin and destination of voyages was constantly raised in cases which arose under the head of international law, which is known to jurists by the name of the 'Rule of the War of 1756.'* For the sake of your non-professional readers, I will briefly explain the nature of those questions. In the days of the old Navigation Laws each country prohibited the carrying on of its colonial and coasting trade to all except its own national merchant shipping. None but a French vessel could trade from a French colony or a French port to another French port. When war broke out, however, and the French marine were

* Vide a very learned disquisition on this head in Appendix A, Rob. Adm. Rep. vol. iv.; vide also the celebrated case of the 'Immanuel,' 2 Rob. Rep. 197.

not in the ascendant, the French Government was only too glad to allow neutrals to carry on a trade which was denied to them in peace, but which the feebler Power could no longer conduct for itself. The maritime belligerent States, however, such as Holland and England, who had the superiority at sea, refused to neutrals the enjoyment of this privilege, which was only conceded to them by the feebler Power in order to evade the rights of capture which the more potent belligerent would have been enabled to exercise against the merchant shipping of the enemy. Direct voyages by neutral vessels from one colony or one port of the enemy to another port of the enemy were adjudged unlawful, and the vessels and cargoes were subjected to capture and condemnation. This species of trade, however, was too advantageous and lucrative to neutrals not to lead to the most elaborate and ingenious system of evasions. It will be observed that what was forbidden was a *direct* trade from the belligerent colony to the mother country. A trade from the belligerent colony to a neutral port was lawful; so was a trade in goods not contraband from a neutral port to the belligerent mother country. If, then, the voyage could only be broken into two parts, that which directly would have been an unlawful adventure might be made lawful in each of its separate sections; and so by a mere interruption of the *transitus* that which was prohibited if it took place directly might by a simple artifice be accomplished indirectly with safety. But, after all, law is a system of enlightened common sense, disciplined by reason and illustrated by logic. It is not to be made the dupe of shallow devices, and it will find the means of arriving at the truth through all the mists which subterfuge may attempt to cast around the real character of the transactions with which it is called upon to deal. I don't know that the real beauty and precision of the science of the law is anywhere better illustrated than in the manner in which the great English judges have dealt with this class of questions.

A few examples will best illustrate the principles on which they have proceeded and the rules by which they have been guided. The first case I shall cite is that of the 'Ebenezer' (*Rob. Rep.*, vol. vi., p. 250). This was the case of a Prussian vessel, captured while carrying wine and brandy from Embden

(a neutral port) to Antwerp (a belligerent port). If this had been the real voyage, it would have been innocent, but the captors contended that the voyage was, in fact, a prohibited one, viz. from Bordeaux to Antwerp (both belligerent ports)—the voyage being in reality continuous, notwithstanding the colourable interposition of a neutral port. The vessel stayed three days in the neutral port, and obtained new clearances and bills of lading there. The cargo was condemned. The principles of this decision are carefully explained in the judgment.

It is not to be doubted (said Lord Stowell), I think, that the original scheme of this voyage was from Bordeaux to Antwerp, and upon the ground which has been pressed in argument, the very short stay at the port of Embden. The ship arrived there on the 8th of July, and sailed again upon the 11th, after a stay of only three days. But this is not all, for I perceive that the bill of lading is dated on the 9th, or the very next day after the arrival. Am I rash, then, in concluding from this circumstance that the original intention of the voyage was from Bordeaux to Antwerp? Very different is it from the case which has been cited in which the ship had been lying for three weeks at Embden. That material fact afforded time for new speculations, and rendered it equivocal, at least, whether the ulterior voyage, which was afterwards pursued, did not spring from some change of intention which had taken place in the mind of the owner. Here, on the contrary, it is fairly to be presumed, from the hurry in which the business was conducted, so as not to leave time for a new charter-party, that the destination to Antwerp was the plan of the original voyage; as such it is to be considered, for all purposes of reasonable construction, as a voyage from Bordeaux to Antwerp. It is said that no fraud has been practised; that the parties were doing no more than they might have done in a direct way. But is it *no* fraud? Is it not rather a double fraud to represent the voyage from Bordeaux to have been to Embden, and the voyage to Antwerp to have been from a neutral port? Is the holding out of Embden one of the terms of each voyage nothing to lull to sleep the suspicions of British cruisers? Deceit was practised as to the destination, and I must think a fraudulent deceit, for the express purpose of evading the jealousy and vigilance with which a direct destination in such a trade would have been considered. I shall therefore reject the claim.

Now, I have had occasion in a former letter to observe that Nassau is very much to the American cruisers what Embden was at the commencement of this century to the English blockading force. I therefore entreat your mercantile readers carefully to consider the consequences which may be legitimately deduced from the judgment I have just cited.

So, again, in the case of the 'Thomyris' (*Edwards's Adm.*

Rep., p. 17), it was held in the case of a cargo of barilla, originally brought by an American vessel from Alicant to Lisbon, and there transhipped for Cherbourg, that the transhipment from a neutral vessel at a neutral port into another vessel, and even an ostensible sale there, did not break the continuity of the voyage. The vessel was captured on the voyage from Lisbon to Cherbourg, which was *per se* innocent. The cargo was, however, condemned, the voyage being treated as continuous from Alicant to Cherbourg, and as such adjudged unlawful. The following passages are extracted from the judgment of the Court:—

In all cases of this description it is a clear and settled principle that *the mere transhipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual importation into the common stock of the country where the transhipment takes place.* . . . If there was nothing more than a transhipment of the cargo from one vessel to another, that will not alter the transaction in any respect, and it must still be considered as the same continuous voyage to the port where the cargo was ultimately to be delivered. It is, however, contended that there was not simply a transhipment of this cargo, but likewise an actual sale of it upon its arrival in the Tagus, and therefore that the question arises whether the additional fact of a sale being made of the cargo at the port of transhipment will, under all the circumstances attending such sale, give it the character of a new voyage, or whether the two parts are so linked together that it must still be considered as one entire voyage. . . . When a cargo is sold to be immediately transhipped and exported, that can never be considered as an importation at all; it is all one act, of which the sale and the transhipment are only stages; *they lengthen the chain but do not alter its* direction. . . . There is no breach of the continuity of the voyage; if permitted, it is clear that there would be no means of preventing an universal evasion of that order which prohibits the trade between the ports of the enemy.

In the case of the 'Maria' (*Rob. Rep.*, vol. v., p. 365), the same doctrine is laid down, and the previous cases are carefully reviewed. In that case Lord Stowell remarks:—

It is a question in its nature subject to very considerable difficulty in particular cases, and one in which the Court must exercise its judgment with great caution, on the special circumstances which compose the substance of each case, and with great care not to attribute more weight to any particular fact than what it justly demands. . . . It is an inherent and settled principle in all cases in which the same question can have come under discussion, that the mere *touching at any port without importing the cargo into the common stock of the country will not alter the nature of the voyage,* which continues the same in all respects, and must be considered as

a voyage to the country to which the vessel is actually going for the purpose of delivering her cargo at the ultimate port.

But, beyond doubt, the most important and instructive decision on this head of law is that in the case of the 'William' (*Rob. Rep.*, vol. v., p. 385), which was adjudged before the Lords Commissioners of Appeal in Prize Causes. The judgment was delivered by Sir W. Grant, and is a memorable monument of the luminous intelligence and unrivalled power of logical analysis for which that eminent judge was so justly renowned. Every lawyer who wishes to comprehend the true bearings of this question should study it with the most careful attention. I shall have sufficient consideration for your space, already too largely encroached upon, to trouble you only with the following extract: —

What, then, with reference to this subject, is to be considered a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course in which the voyage could be performed would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation—whether it be more or fewer leagues, whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; *nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress.* The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another..... Again: let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? *The truth may not always be discernible, but when it is discovered it is according to the truth and not according to the fiction that we are to give to the transaction its character and denomination.* If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but *if the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the*

observance of the law the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same—the landing of the cargo, the entry at the Custom-house, and the payment of such duties as the law of the place requires, are *necessary ingredients* in a genuine importation; the true purposes of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies,* which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue the appearance of being broken by an importation which he has resolved not really to make.—*Rob. Rep.*, vol. v., p. 391–7.

It is impossible not to admire the masculine good sense by which these judgments are distinguished. They are a perfect model for jurists, showing how a just and enlightened judge, putting aside that which is merely formal and superficial, seeks to grasp the reality and the substance of the matter, and, crushing the husk of evasion, extracts the kernel of truth. The 'Rule of the War of 1756' was in former days much questioned, both in its principle and its application, and has now lost much of its practical importance by the general relaxation of the close system of the Navigation Laws. But the principles of these decisions, so far as they affect the question either of the origin or the destination of a voyage, are perfectly applicable still to all questions such as those of contraband voyages or breaches of blockade where it may become necessary to determine the true character of the adventure in regard of its terminus. For it will be observed that the doctrine of continuous voyages stands entirely on its own footing, and is completely separable from the particular question of the propriety of the 'rule of 1756,' which has been and is disputed. Kent, who, from an American point of view, speaks doubtfully as to the rule of 1756, distinctly approves the principles of the decisions to which I have referred as far as they go to the determination of the true destination of a voyage:—

It is understood that the English and American Commissioners in London, in 1806, came to an understanding as to the proper and defined test of a *bonâ fide* importation of cargo into the common stock of the country, and as to the difference between a continuous and interrupted voyage. But the

treaty so agreed upon was withheld by President Jefferson from the Senate of the United States, and never ratified. The doctrine of the English Admiralty is just and reasonable on the assumption of the British rule, *because we have no right to do covertly and insidiously what we have no right to do openly and directly.* That rule is, that a direct trade by neutrals between the mother and the colonies of the enemy, and not allowed in time of peace, is by the law of nations unlawful. But if that rule be not well grounded, all the qualifications of it do not help it; and in the official opinion of Mr. Wirt (the Attorney-General of the United States) to the executive department, while he condemns the legality of the rule itself, he approves as just in the abstract the English principle of continuity.—*Kent Comm.* i. p. 85.

It is greatly to be regretted that the treaty here referred to should have fallen through, as its terms would have probably settled the principles which ought to govern this difficult question in a manner far more satisfactory than can be arrived at by general reasonings.

For other examples of the application of the doctrine of the 'continuity' to cognate questions, arising under the old Navigation Laws, *vide* the judgment of Lord Stowell in the case of the 'Matchless,' 1 *Hagg. Adm. Rep.*, p. 97, and the 'Eliza Ann,' *ibid.* p. 257.

Let us, then, shortly sum up the principles of interpretation applicable to this matter. In order to determine the destination of the vessel or the cargo, the Court will endeavour to ascertain what Lord Stowell calls the true 'scheme of the voyage.' This will depend on the real intention of the authors of the adventure at the time of the capture, which intention is to be gathered from an impartial and intelligent survey of the surrounding circumstances. It is a sound maxim of law, '*in jure non remota causa sed proxima spectatur.*' The Court ought, therefore, not to be too curious or astute to pursue remote possibilities to their ulterior consequences. For, as Lord Bacon says, 'It were infinite for the law to consider the causes of causes, and their impulsions one of another.' But there is another maxim equally sound, and not less to be observed, '*Dolus circuitu non purgatur.*' The truth lies, as the mathematicians would say, between the circumscribing limits of these two maxims. The law will not suffer itself to be baffled by artifice or evasion. It will thread the mazes of fraud, in order to enforce the rule of right. If, then, the real

substantial *bonâ fide* intention of the voyage appears in its inception and at the time of capture to have had its true terminus in neutral territory, and the goods were destined to pass actually (as Lord Stowell terms it) 'into the stock of the neutral country,' and will, when they arrive, have (as the lawyers say) 'got home' in the neutral country, the voyage is clearly innocent, and there can be no condemnation, either on the ground of contraband or of breach of blockade. But if, on the other hand, it shall appear on sufficient evidence to satisfy a just and enlightened judge that the real object and intent of the voyage in its inception was to the belligerent, then no interposition of one or of fifty neutral ports, no meditated series of transhipments, no cleverly contrived artifices of colourable clearances, importations, or even sales in the neutral port, will avail to disguise the real character of the transaction. It will be regarded as a continuous voyage to the belligerent. The device of an intermediate neutral destination will be set aside; and the ship and cargo will, in every stage of such a voyage, be dealt with according to the reality, and not according to the appearance, of their consignment. If a vessel or cargo is shown on sufficient evidence to have been originally and substantially destined for Charleston, all the contrivances to make it appear that they were designed for Nassau will be of no avail. As Lord Stowell has said, these subterfuges 'only lengthen the chain, they do not alter the direction'—or, to borrow the words of Sir W. Grant, 'the truth may not always be discernible; but, when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination.' This is common sense and common justice, and it is and ought therefore to be law.

It is unquestionably true, as is laid down in the case of the 'Imina' (*Rob. Rep.*, vol. iii., p. 167), that, as a general rule, in the case of contraband, 'the articles must be taken *in delicto*, in the actual prosecution of a voyage to an enemy's port.' But the *delictum* consists in the intention to make such a voyage unretracted and unaltered at the time of seizure. And so noxious is a contraband voyage held to be, that in the latter cases it was decided, that when such an adventure had been successfully accomplished with false papers, even the return

cargo would be effected with condemnation. ('The Charlotte,' *Rob. Rep.*, vol. vi., pp. 382, 386; *vide* also 'The Margaret,' 1 *Acton Rep.*, p. 333.)

I should be glad to learn how those persons who maintain that in cases of contraband the *immediate* destination alone is to be regarded, and that the *eventual* destination is to be wholly put aside, undertake to explain the important and instructive judgment in the case 'The Richmond' (*Rob. Rep.*, vol. v., p. 325). This judgment affords an admirable illustration of the manner in which Lord Stowell dealt with these complex and ambiguous voyages. The case was one of an American neutral vessel carrying pitch and tar. The question was, whether the true destination was to St. Helena, which would have been an innocent, or to the Isle of France, which would have been an unlawful, voyage. The judgment argues the matter on either hypothesis. Lord Stowell says (p. 336):—

> There are strong grounds to presume that the original destination was *absolutely* to the Isle of France. But supposing that it was of a shifting nature, and that *it was merely eventual, that in law would be quite sufficient.* .... It is not necessary to inquire whether the suspicion (i.e. of the direct voyage) was well founded or not; because, if the intention was no more than this—'I will go and sell pitch and tar at St. Helena if I can, and, if I cannot, I will go on with them to the Isle of France and sell them there'—that is an unlawful purpose, and *every step taken in prosecution of such a design is an unlawful act. The interposition of an English port would not make it innocent.*

Other instances of the principles upon which cases of this sort have been dealt with in the English Courts will be found in the 'Two Nancies' (*Rob. Rep.*, vol. iii., pp. 83, 122), 'The Baltic' (1 *Acton Rep.*, p. 25), and 'The Rosalie and Betty' (*Rob. Rep.*, vol. ii., p. 343).

It may here be proper to observe that there is an important distinction between the cases of contraband and those of breach of blockade. Contraband on its road to the enemy is always subject to capture on the high seas, whatever may be its route; goods or vessels on their way to a blockaded place are not necessarily so in all cases. In the latter case the offence is the breach of blockade; but, the blockade being only established by sea, if the ultimate arrival at the blockaded place is not to be by sea, there is no offence, because there is no breach of

blockade. If, therefore, goods not being of the nature of contraband are on a continuous voyage to a blockaded place, but they are intended ultimately to reach the blockaded terminus overland or by an inland navigation, or, in short, by any route which does not involve a breach of the sea blockade, the voyage is innocent, and they cannot be condemned. This was the point decided in favour of neutrals by Lord Stowell in the cases of the 'Stert,' the 'Jonge Pieter,' and the 'Ocean.' But when part of the voyage necessarily in its accomplishment involves a breach of the sea blockade, then, even though the actual breach of blockade takes place in a different vessel, the whole transaction will be regarded as continuous, and the ship and cargo will be condemned. Thus, in the case of the 'Charlotte Sophia' (*Rob. Rep.*, vol. vi., p. 204), the goods were shipped at Tonningen for Algesiras, which would have been a lawful voyage, but the cargo having been brought out of the blockaded port of Hamburg in lighters (from which place also the ship sailed, but in ballast), for the purpose of being shipped on board the vessel at Tonningen, the ship and cargo were condemned. And Lord Stowell, in the similar case of the 'Maria' (*ibid.*, p. 203), says:—

> That they were brought through the mouth of the blockaded river for the purpose of being shipped for exportation, would subject them to be considered as taken *on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the terminus* a quo *and the terminus* ad quem *are precisely the same as those of the more circuitous destination.*

And so, again, in the 'Lisette' (*ibid.*, p. 394), the same eminent judge says:—

> I have been compelled to hold, that when goods are brought down from the blockaded port to a neighbouring port on purpose to be shipped for the enemy's country, an adventure so conducted is nevertheless a breach of blockade.

These were cases of breach of blockade by egress; but of course precisely the same reasoning applies to cases of ingress.

The question of destination in the case of blockade, as in that of contraband, is, as the common law lawyers would say, 'for the jury'—it is a question of evidence and of moral presumption from the facts of the case. Thus, in the case of the 'Mentor' (*Edwards's Adm. Rep.*, p. 207), the ship's papers

were all made out for St. Sebastian—an innocent destination—but, the ship being found out of her true course for that port, Lord Stowell left the question to the Trinity Masters, and they having found that she was not pursuing her course to St. Sebastian, though no other particular destination appeared, the ship and cargo were condemned. The Court said:—

> If you should be of opinion that St. Sebastian was not her real destination, I am afraid the legal conclusion will be that the port of her real destination, which is dissembled in her paper, is so dissembled because it is one which could not safely be disclosed. All the papers, except one, certainly hold out a destination to St. Sebastian; but still, as it is possible that such documents may be fabricated, the fact of the navigation must overpower the result that would arise from the mere consideration of the papers themselves.

Vide also the case of the 'Franklin' (*Rob. Rep.*, vol. iii., p. 217), and the 'James Cook' (*Edw. Rep.*, 261).

Questions of more or less difficulty will of course arise according to the circumstances of each particular case. When the ship itself is engaged in a continuous voyage to the belligerent, the principles of decision will be simple enough. When, however, the voyage of the ship actually terminates in a neutral country, but the cargo is consigned for eventual transhipment to a belligerent port, questions of greater difficulty will arise. The cargo itself, as I have already said, in such a case will be liable to condemnation. But what of the ship? The situation of the ship will clearly depend on the conduct and privity of the owner or master to the illegal destination of the goods which he assists in transporting. If he knowingly assists in accomplishing a section of an unlawful adventure, there can be no reason why he should not suffer for it, just as he would in an ordinary case of contraband. It would, however, be clearly unjust that a shipowner who takes on board an ostensibly innocent cargo with an apparently neutral consignment, should suffer for the unavowed and concealed intentions of the freighter, who in reality contemplates an unlawful destination. In such a case it would be the duty of the Prize Court to indemnify the ship-owner for the inconvenience he sustains by the allowance of freight and expenses. This was the course taken by Lord Stowell in the case of the 'Ebenezer' (6 *Rob.*, p. 256), on the express ground that 'the owner of the ship might not be

conusant of the intention under which the original destination was continued.'

It may be objected, perhaps, to the doctrine I have endeavoured to expound, that it allows an immense and dangerous latitude to the discretion of the Prize Court. That it does so cannot be disputed; but this is an incident inseparable from the nature of the tribunals appointed to administer the law of nations. The Court exercises at once the functions of judge and of jury, and decides both on the law and on the facts of the case. To a great extent neutral nations are compelled to rely upon the learning, the impartiality, and the intelligence of those who preside in the belligerent Prize Courts. We ourselves in this respect have made large demands on the confidence of neutral nations—a confidence which I firmly believe was never wittingly abused. We cannot refuse to others the exercise of the same rights on which we have ourselves insisted until we are able to demonstrate that they are incapable or unworthy to exercise them. No doubt, the spirit and the character of the decisions of the American Prize Courts will be, and ought to be, looked for with interest, and criticised with severity in this country. There is no greater offender against the commonwealth of nations than an unjust, an unfair, and an incapable judge of a Prize Court. He pollutes the fountain of justice, and imperils the peace of the world. The eyes of mankind are on the American tribunals, and they will do well if they can prove that they have not degenerated in integrity, wisdom, and learning from those illustrious magistrates to whom they have succeeded. I am happy to find that Lord Russell is able to state on the authority of the law officers of the Crown, that hitherto 'there has been no rational ground of complaint as to the judgments of the American Prize Courts.'

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